No. 80-1165

In the Supreme Court of the United States

OCTOBER TERM, 1980

PATRICK W. HANIGAN AND THOMAS H. HANIGAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioners contend that the court of appeals erred by dismissing their appeal from a ruling of the district court denying their post-trial motion for judgment of acquittal and ordering a retrial of the case.

1. Petitioners were indicted in the United States District Court for the District of Arizona for violation of the Hobbs Act, 18 U.S.C. 1951. The indictment charged that petitioners had obstructed interstate commerce by robbing and assaulting three Mexican citizens who travelled from Mexico to Arizona in search of employment (Pet. App. D).[1]

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[1]Prior to their federal court indictment, petitioners were tried in state court and were acquitted on certain charges growing out of the same events. They unsuccessfully contended in the district court that the prior state court prosecution gave rise to a double jeopardy bar against further prosecution under federal law. The court of appeals affirmmed the

Following a trial by jury, the members of the jury panel were unable to reach a verdict and the district court ordered a mistrial. On the same day, petitioners made a motion for a judgment of acquittal. In support of their motion, petitioners filed a memorandum contending that the Hobbs Act did not apply to the conduct described in the indictment and that the prosecutor failed to prove that the events in question had any effect on commerce. The district court denied the motion without opinion and set the case for retrial (Pet. App. A). Petitioners then appealed the denial of their motion for a judgment of acquittal.[2]

The prosecutor moved to dismiss the appeal on the ground that it was not based on a final judgment. The court of appeals granted the dismissal motion on October 17, 1980 (Pet. App. B), relying on its recent decision in *United States* v. *Carnes*, 618 F. 2d 68 (9th Cir.), cert. denied, No. 79-6629 (June 16, 1980).

Following the decision of the court of appeals and a denial of rehearing on December 3, 1980, petitioners filed a petition for a writ of certiorari in this Court on January 13, 1981, one week before their retrial was scheduled to commence. On January 15, 1981, petitioners' application for a stay of the retrial in the district court was denied by Mr. Justice Rehnquist. The retrial began in the district court on January 20, 1981.

2. Petitioners contend (Pet. 21-31) that this Court's decision in *Abney* v. *United States*, 431 U.S. 651 (1977), entitles

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district court's rejection of that double jeopardy claim, and this Court denied certiorari. *Hanigan* v. *United States*, No. 79-1609 (May 19, 1980).

[2]In addition, before the start of the retrial, petitioners filed a motion to dismiss the indictment and based the motion in part upon their double jeopardy claim. The district court has not ruled upon the motion, but is deferring its decision until the close of evidence.

them to interlocutory appellate review of the district court's ruling denying their motion for a judgment of acquittal. In their view, *Abney* requires the court of appeals to consider at this interlocutory stage the question whether the government presented sufficient evidence during the first trial from which the jury could find guilt beyond a reasonable doubt. In the absence of such a determination, they contend, they may not be retried consistent with this Court's decision in *Burks* v. *United States*, 437 U.S. 1 (1978).

Whatever the merits of petitioners' claim under *Abney* and *Burks*,[3] this case plainly presents an inappropriate vehicle to resolve the issue they raise. The retrial in this case commenced on January 20, 1981. Based on the length of time required to try the case during the first trial, it is anticipated that the retrial will be completed within a week of the filing of this memorandum and prior to any action by this Court on the petition for a writ of certiorari.

If petitioners are acquitted at trial, their double jeopardy claims will be moot. On the other hand, if they are convicted, and if they believe either that the government's proof was inadequate in the second trial or was inadequate during the first trial and was improperly supplemented during the second trial, they may present such claims, together with any others arising out of the retrial, at one time on review of a final judgment of conviction. Since it is no longer feasible to pursue interlocutory review in this case, petitioners should present their double jeopardy claims (if they are

[3] *United States* v. *Becton*, 632 F. 2d 1294 (5th Cir. 1980), is in agreement with the Ninth Circuit's ruling here that interlocutory appellate review is not available to test the sufficiency of the government's evidence during a trial that leads to a mistrial and necessitates a new trial. In cases in which defendants successfully have appealed an initial conviction, and have claimed on remand that retrial is barred by the government's failure to adduce sufficient evidence during the original trial, two courts of appeals have granted immediate appellate review. See *United States* v. *United States Gypsum Co.*, 600 F. 2d 414 (3d Cir. 1979); *United States* v. *Jelsma*, 630 F. 2d 778 (10th Cir. 1980).

convicted) on review of the district court's final judgment. See *United States* v. *Becton, supra,* 632 F. 2d at 1296 ("it is not an open question * * * that precisely this issue [double jeopardy] is subject to review on appeal from a * * * conviction, should one occur").

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981